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JUN 28 1985
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84-2029

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GERALD ANTHONY GASPARRO,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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The petitioner, Gerald Anthony Gasparro, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut.

QUESTIONS PRESENTED[1]

1. Whether the limitations imposed on police stops by *Terry v. Ohio*, 392 U.S. 1 (1968), and the prohibition against custodial investigation stated in *Dunaway v. New York*, 442 U.S. 200 (1979), can be circumvented by the State's substitution of a prior

[1] Only the first question is presented for argument in this petition. Petitioner reserves the right to argue the remaining questions if the writ is granted.

criminal occurrence for the actual criminal activity which caused a warrantless arrest, conceded to have been made without probable cause, in order to avoid the exclusionary rule?

2. Whether the trial court erred in denying petitioner's motion to dismiss for lack of a speedy trial where the delay between arrest and trial was more than three and one-half years, the prosecutor did not go forward on the date the case was scheduled for trial and for a period of approximately four months the case was either on top of the calendar or one of the first three cases listed for trial?

3. Whether the petitioner was deprived of a fair trial by the admission of evidence of a crime committed by another; the prosecutor's improper summation statement that the petitioner had discarded identification papers which would have shown he was a perpetrator of the crime; and the denial of requested jury instructions concerning petitioner's presence near the scene of the Danbury crime?

4. Whether the petitioner was denied due process of law when the Connecticut Supreme Court failed to recognize the State's concession that he was illegally arrested and improperly made determinations of fact?

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut is reported in 194 Conn 96. The opinion of the suppression hearing court was not reported. Copies of both opinions are included in the appendix.

JURISDICTION

The decision of the Supreme Court of the State of Connecticut was released on July 31, 1984. The order denying defendant's motion for reargument is dated October 10, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

This petition is filed out of time due to error; however, extensive postconviction litigation can be avoided by a waiver of the time requirement and a determination of this petition on its merit.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Gerald Gasparro stands convicted of the crime of larceny by false pretense for the theft of a diamond on October 13, 1978, from Shaeff's Jewelers, a jewelry store in Norwalk, Connecticut. His arrest and prosecution for that crime stem from the following events [2]:

On October 20, 1978, one, Andrew Posnak, using the name Arthur Abo, was arrested for the attempted larceny of a diamond at Charlop's Jewelry Store in the City of Danbury, Connecticut. While being taken to a Danbury police station he expressed concern for his car which was parked on a side street and a police officer was assigned to watch the car (SH. 13-15). Within the hour of Posnack's arrest Gasparro approached Posnack's car and tried to enter with a key. The police officer assigned to that post told Gasparro he could not enter the car and Gasparro left (SH. 79-81). Although Gasparro created no disturbance and was not engaged in any criminal activity he was confronted and seized by the Danbury police on Main Street, taken to the Posnack car, compelled to furnish identification contained in his luggage inside the car and then transported to Danbury police headquarters for further questioning (SH. 87-93; 246-249; 262; 281-282). This action by the Danbury

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[2] The reference "R" designates documents contained in the printed record, "SH" refers to pages in the transcript of the suppression hearing, "T" refers to pages in the trial transcript, and "A" refers to pages in the appendix of this petition.

police was without either an arrest or search warrant. Before Gasparro was confronted on the street the Danbury police had information obtained from the Charlop's jeweler consisting of two retail jewelers' association flyers referring to other similar crimes in Connecticut. One flyer referred to a jewelry store larceny in Norwalk involving two men, one of whom used the name Arthur Abo. The other referred to a similar crime committed by one man. Both contained general physical descriptions. No police bulletins had been received by the Danbury police and they had not been requested by any police department to arrest Gasparro (SH. 135-136). Gasparro was formally arrested at police headquarters after questioning (SH. 272) and was charged with the attempted larceny at Charlops (T. 34-35).[3]

The Norwalk police were then notified by the Danbury police that two men had been taken into custody (SH. 126, 132). The Norwalk police responded by sending two detectives and Richard Shoen, an employee of Shaeff's Jewelers, to Danbury for the purpose of identifying the persons in custody or any recovered property (SH. 209-210). Shoen identified a silver necklace as an item of jewelry worn by Gasparro using the name Arthur Abo (SH. 183; T. 191-193). Photographs of Gasparro developed from photo plates obtained from the Danbury police were used by the Norwalk police in a photo array shown to Kurt Rath, the owner of Shaeff's Jewelers, and Richard Shoen (SH. 149-150, 210-213, 162-163). The photographic identification of Gasparro and the identification evidence obtained from the search of Gasparro's luggage were used by the Norwalk police to obtain an arrest warrant for Gasparro on October 21, 1978 (SH. 236-238; R. 4-5). Gasparro was arrested three days later by Norwalk police officers pursuant to the arrest warrant (T.224).

Gasparro was arraigned on October 24, 1978, on a short form information charging him with committing the crimes of larceny

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[3] There was no evidence of Gasparro's connection to the attempted larceny at Charlop's Jewelry Store and the Danbury charge was dismissed (SH. 57-58; T. 34-35).

in the first degree and conspiracy in Norwalk. On November 15, 1978, an information was filed charging him with larceny only (R.5). In December, 1978, petitioner moved to suppress identification and other evidence derived from his unlawful arrest by the Danbury police (R. 8-10)[4] The case was scheduled for trial on May 8, 1980, but on that date an amended information was filed and served over petitioner's objection. The case was then continued to May 28, 1980, for trial and the petitioner reserved on his motion to dismiss on speedy trial grounds (R. 10-11; transcript of court proceedings 5/8/80 pp 3-4). Because the State was not ready for trial on May 28, 1980, the case was adjourned without date. During the period May 22, 1980, through September 30, 1980, the case was either the first case listed for trial or one of the first three cases on the assignment lists for trial (R. Assignment lists for trial 5/22/80 - 9/30/80).

The petitioner's motion to suppress was heard in January, 1982. At the suppression hearing the State conceded that the petitioner's arrest for the Danbury crime was unlawful.[5] The State contended, however, that at the time of petitioner's illegal arrest for the Danbury crime the Danbury police had probable cause to arrest him for the Norwalk crime (R. 13). The State's Attorney then set out to prove that the seizure of Gasparro for the Danbury crime was also due to Danbury police contact with the Norwalk police or the result of collective police organization knowledge (SH. 41-45). The testimony of the Norwalk police, however, was that when first contacted by the Danbury police they were informed that *two* men were being held (SH. 142). The arresting officers testified that their seizure of the petitioner was an investigatory stop and detention, that Gasparro was being brought in for questioning and that after questioning at police headquarters he was formally arrested (SH. 92-93, 272, 281-282; A. 36). No evidence was presented by the State

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[4] A motion to suppress requires the court to determine whether evidence should be suppressed under the constitution or laws of the United States (Conn. Practice Book §§ 820, 821).

[5] The reason for the concession was not recorded. Petitioner acknowledges that there was valid legal ground for the concession.

to show that the Norwalk police had requested Gasparro's arrest or that any Danbury police officer arrested the petitioner for the Norwalk crime or intended to arrest him for that crime. There was no evidence controverting the fact that Gasparro was actually arrested for the Norwalk crime on a subsequent date by Norwalk police officers pursuant to the warrant based on evidence derived from the prior arrest in Danbury.

The suppression hearing court denied petitioner's motion on February 23, 1982, noting in its decision of record the State's concession of the illegality of Gasparro's arrest for the Danbury crime and holding that there was probable cause to arrest him for the Norwalk crime (T. 11-16; A. 20). The court relied on the standards set forth in *Terry v. Ohio*, 392 U.S. 1, to justify the actions of the Danbury police in confronting and seizing the defendant (T. 15). The decision contained no ruling on the search of the automobile. Nor did the decision refer to the absence of contemporaneous criminal conduct in Norwalk or the absence of any evidence showing that the Danbury police arrested the petitioner for the Norwalk crime.

The case did not come up for trial until May 11, 1982, more than three and one-half years after Gasparro's arrest. Petitioner's written motion to dismiss for lack of a speedy trial was filed on May 10, 1982 (R. 17-18). Substantial factual issues were raised by the motion and during oral argument regarding the reasons for the delay, the failure of the prosecutor to go forward on the scheduled trial date and whether the petitioner had been prejudiced by the delay (T. 11-15). The petitioner claimed that no more than six months of the delay could be attributed to him (R. 17; T. 3). The State's attorney did not know why the case did not go forward and claimed that there were times that defense counsel was unavailable (T. 8-11). The motion was denied without opinion and without an evidentiary hearing on May 11, 1982 (R. 18).

At trial the photograph of Gasparro was used over continuing objection (T 91-93), to establish Gasparro's identification

before an in-court identification of him was made (T 93-97; 194-196, 198).

The petitioner appealed from his judgment of conviction to the Supreme Court of the State of Connecticut and in his statement of issues raised on appeal claimed as error the lower court's denial of his motions to suppress evidence and to dismiss for lack of a speedy trial (R. 21; Appellant's brief p. V).

The Connecticut Supreme Court found no error. In its opinion it did not consider the in court, of record, concession by the State that the petitioner's arrest for the Danbury crime was illegal. It found that when the petitioner was observed and confronted on Main Street by the Danbury police there was probable cause to arrest him for his participation in the Norwalk crime as well as the Danbury crime (State v. Gasparro, 194 Conn 96, 106-107; A. 1). The court also determined that there had been an authorized inventory search of the car (Id at 107-108).

In reviewing the trial court's denial of petitioner's motion to dismiss the Connecticut Supreme Court made various findings of fact not made by the trial court regarding the length and reasons for the delay, prejudice to the petitioner, and the petitioner's assertion of his right to a speedy trial (Id at 98-102).

The defendant moved for reargument on the grounds that the Connecticut Supreme Court erroneously made determinations of fact, refused to recognize the State's in court concession that the defendant's arrest for the Danbury crime was illegal, failed to remand the case for further hearings on issues of fact regarding the violation of his right to a speedy trial and the search of the automobile and denied the defendant due process of law. The motion was denied without opinion (A. 25).

REASONS FOR GRANTING THE WRIT

As a result of the Connecticut Supreme Court decision the police in that State are permitted to expand a police stop under *Terry v. Ohio*, 392 U.S. 1 (1968), into an investigative arrest

in violation of the Fourth Amendment. Further, Connecticut police officers and prosecutors need not concern themselves with whether custodial investigation is prohibited by the Supreme Court of the United States because the State's highest court approves such conduct.

The Petitioner was the subject of an illegal investigatory arrest by Danbury police officers. He was taken into custody by the Danbury police for questioning regarding an attempted larceny at a local jewelry store and after questioning formally arrested. This type of police conduct violated the Fourth Amendment and the limits of a permissible *Terry* stop. It is prohibited under *Dunaway v. New York*, 442 U.S. 200 (1979), and evidence obtained and derived from his illegal arrest was inadmissible. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Davis v. Mississippi*, 394 U.S. 721 (1969).

The arrest of Gasparro by the Danbury police was neither made nor intended for the Norwalk crime and the State Attorney's claim of collective knowledge was refuted by the Norwalk Police themselves. Obviously Gasparro was already in custody in Danbury if at the time of Norwalk's first contact from the Danbury Police they were informed that *two* men were being held.

A warrantless arrest based on probable cause is linked to the criminal activity for which it is made, at the time it is made. The police and prosecutor should not be permitted to create a nonexistent dual purpose arrest to circumvent the exclusionary rule.

Therefore, in addition to those reasons stated above, this Court should not allow the Connecticut Supreme Court decision to stand because it grants to prosecutors the discretion to change the purposes and reasons for which arrests are made by the police.

CONCLUSION

For the reasons stated Petitioner respectfully prays that this Court will grant this petition and issue a writ of certiorari to the Supreme Court of the State of Connecticut.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF CONNECTICUT *v.* GERALD A. GASPARRO (11520)

SPEZIALE, C. J., PETERS, HEALEY, SHEA and GRILLO, Js.

Convicted of the crime of larceny in the first degree by obtaining property by false pretenses, the defendant appealed. There was evidence presented at trial to the effect that he, along with another person, had fraudulently obtained a diamond from a Norwalk jewelry store. *Held:*

1. The trial court did not err in denying the defendant's motion to dismiss the matter for lack of a speedy trial; the substantial delay on the part of the state in bringing the case to trial was outweighed both by the failure of the defendant timely to assert his right to a speedy trial and by the absence of a showing that he was substantially prejudiced by the delay.
2. Because, under the totality of the circumstances here, there was probable cause to arrest the defendant at the time he attempted to enter an automobile which was under police surveillance and because the subsequent inventory search of the automobile and its contents was justified, the trial court did not err in admitting into evidence the items seized in that search.
3. The trial court did not err in admitting evidence of an alleged attempt by the defendant and his accomplice some one week following the commission of the crime charged here to defraud a jewelry store in Danbury; the two incidents were sufficiently similar to render evidence of the Danbury attempt admissible to establish the defendant's identity as a participant in the Norwalk crime.
4. The trial court adequately instructed the jury on the mental element necessary for accomplice liability and on the limited purpose for which it should consider the evidence of the Danbury attempt.

Argued May 3—decision released July 31, 1984

Information charging the defendant with the crime of larceny in the first degree by obtaining property by false pretenses, brought to the Superior Court in the judicial district of Fairfield at Bridgeport and tried to the jury before *McKeever, J.;* verdict and judgment of guilty, and appeal by the defendant to this court. *No error.*

Lawrence A. Porcari, with whom was *Robert Rasamny,* for the appellant (defendant).

Jonathan C. Benedict, assistant state's attorney, with whom, on the brief, was *Donald A. Browne,* state's attorney, for the appellee (state).

SHEA, J. A jury found the defendant guilty of "larceny in the first degree by obtaining property by false pretense" in violation of General Statutes § 53a-119 (2).[1] From the judgment upon the verdict he has appealed, claiming that the court erred: (1) in denying his motion to dismiss for lack of a speedy trial; (2) in denying his motion to suppress certain evidence derived from his arrest, which he claims was illegal; (3) in admitting evidence of a similar crime in which the defendant may have been involved which occurred one week after the offense charged; (4) in failing to grant his motion for mistrial because of allegedly improper argument by the state's attorney; and (5) in refusing certain jury instructions requested by the defendant. We find no error.

[1] "[General Statutes] Sec. 53a-119. LARCENY DEFINED. A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to: . . . . (2) Obtaining property by false pretenses. A person obtains property by false pretenses when, by any false token, pretense or device, he obtains from another any property, with intent to defraud him or any other person."

I

The defendant was arrested on October 21, 1978, by the Norwalk police pursuant to an arrest warrant. He was released on bond on October 25. He was arraigned on November 27 and his motion for discovery was filed on December 14, portions of which the court granted on January 3, 1979. The court at that time also ordered a postponement of a hearing on the defendant's motion to suppress certain evidence until after the state had complied with the order of disclosure. The state filed a disclosure on August 8 and a supplemental disclosure on August 24. Another supplemental disclosure was filed on April 16, 1980.

The parties next appeared in court on May 8, 1980, the date upon which the case had been scheduled for trial.[2] At this time the state moved, over the defendant's objection, to amend the information to correct the reference to the subject of the larceny as "current monies of the United States of America" by substituting "a diamond" for the erroneous phrase. The court allowed the amendment but gave the defendant until May 28, a date agreeable to the defendant, to prepare his case. After the continuance was granted, defense counsel requested that what had transpired "be without prejudice to Mr. Gasparro's right to make a fur-

[2] From the copies of the weekly assignment lists contained in the court file, as requested by the defendant, it appears that this case was first assigned for trial on December 7, 1979, a week before the date upon which motions for disclosure and to suppress evidence were filed by the defendant. The case continued to be included in the weekly lists of cases assigned for trial while the state was complying with the order of disclosure. After the filing of a substitute information on May 8, 1980, and a continuance to May 22, as agreed upon by the defendant, the assignment lists show the case advancing from third to first position on the list, where it remained from June 24 to September 30. Thereafter, it lost ground to other cases, being listed during most of 1981 among the cases assigned for the second or third day of the trial week with approximately twenty cases assigned for trial each day.

ther motion, as far as speedy trial." The state was not ready for trial on May 28 and the case was again postponed.

The parties did not again appear in court until January 6, 1982, when the defendant's motion to suppress certain evidence was heard. During this hearing, which occupied five trial days, the defendant made an oral motion for a speedy trial. Although the record is unclear[3] as to the disposition of this motion, counsel for the defendant has conceded that much of the delay subsequent to the hearing on the motion to suppress was attributable to his request for time to examine the transcript of the hearing in order to file a brief and to his engagement in other trials. The memorandum of decision denying the motion to suppress was filed on February 23. On May 10, the defendant filed a written motion to dismiss for lack of a speedy trial, which the court denied the next day, when jury selection for the trial began.

The four factors which we are directed to consider in evaluating a claim of denial of the constitutional right to a speedy trial are the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker* v. *Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *State* v. *Davis*, 192 Conn. 739, 741, 474 A.2d 776 (1984). "None of the factors standing alone demands a set disposition; rather it is the total mix which determines

[3] Neither the state nor the defendant has made reference in their briefs to the portion of the transcript where this oral motion was made, although the transcript of the hearing on the motion to suppress, January 6–8, 11–12, 1982, has been filed.

The briefs do refer to the trial transcript of May 11, 1982, concerning the argument upon the defendant's written motion to dismiss for lack of a speedy trial. At this proceeding the state claimed that the earlier oral motion for a speedy trial had been granted when the judge, *Herman, J.*, who heard the motion to suppress said, "[a]ll right, you're on trial." The defendant disputed this claim.

whether the defendant's right was violated." *State* v. *Johnson,* 190 Conn. 541, 544, 461 A.2d 981 (1983).

More than three and one-half years elapsed from the arrest of the defendant on October 20, 1978, to the start of trial on May 11, 1982. This extensive delay is clearly sufficient to warrant an "inquiry into the other factors that go into the balance." *Barker* v. *Wingo,* supra, 530. It is not so extreme, however, as the period of more than five years considered in *Barker* v. *Wingo,* supra, and found insufficient by itself to indicate a violation of the speedy trial right. "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." Id., 523.

The defendant blames the state for all but six months of the three and one-half year delay from arrest to trial. He also claims that the failure of the state to go to trial on May 28, 1980, was deliberate and for the purpose of hampering the defense. There is nothing in the record to support this charge, however, and the trial court could reasonably have accepted the explanation offered by the state of a "hefty backlog in cases." Such a reason has been characterized as "neutral," to be weighed less heavily against the state than purposeful delaying tactics but, nevertheless, to be considered, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Id., 531; *State* v. *Davis,* supra, 742–43.

The defendant claims to have asserted his right of speedy trial at the time of the amendment to the information on May 8, 1980, when he requested that those proceedings "be without prejudice to [his] right to make a further motion [for] speedy trial." It is plain, however, that no motion for a speedy trial was actually made until the hearing on the motion to suppress in January, 1982. Notifying the court that the defendant

might in the future demand a speedy trial can hardly be deemed equivalent to a contemporaneous claim for a speedy trial. In fact, this remark, which the defendant now characterizes as a reservation of his right to seek a dismissal for lack of a speedy trial, can fairly be construed to mean that, in the event that he sought a speedy trial, he would file a "further motion." It should also be noted that, despite the fact that the case was carried on the weekly assignment lists sent to counsel for more than two years, several times as the first ready case, the defendant never once appeared in court to oppose a postponement.

"We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker* v. *Wingo*, supra, 532. Our review of the record indicates a complete failure on the part of the defendant to assert his right of speedy trial until the eve of trial.

The defendant has also failed to establish any significant prejudice from the delay, the fourth consideration. "Prejudice, of course, should be assessed in the light of the interests of the defendant which the speedy trial right was designed to protect." Id., 532. Three such interests have been identified: (1) prevention of oppressive pretrial incarceration; (2) minimizing anxiety and concern of an accused; and (3) reducing the possibility of impairing the defense. Id. The first of these concerns is not involved here because the defendant was released on bond a few days after his arrest. The defendant has made no claim and presented no evidence of any anxiety on his part, though we must recognize that even an accused on bond is under some restraint on his liberty and may be living under a cloud. Id., 533. With respect to the effect of the delay on his defense, the defendant maintains that many of the police officers who testified at the suppression hearing appeared to be suffering from a lack of memory. He makes no claim

that any of his own witnesses suffered from this infirmity or that he was unable to present the testimony of any witness because of the delay. The defendant points to nothing in the transcripts which indicates that the testimony of the police officers would have been more favorable to him if their memories had been fresher. We are not persuaded that he suffered substantial prejudice in any respect from the delay.

We conclude from our review that the substantial delay in bringing the case to trial, for most of which the state must bear responsibility, was outweighed by the complete failure of the defendant to assert his right to a speedy trial and by the absence of any substantial prejudice from the delay. We find no error in the denial of the defendant's motion to dismiss for lack of a speedy trial.

II

The basis on appeal for the defendant's motion to suppress is his claim that his arrest was illegal because of the absence of probable cause.

The crime of which the defendant was convicted occurred in Norwalk. On October 11, 1978, a person identifying himself as Arthur Abo telephoned Sheaff's Jewelers, a jewelry store located in Norwalk, and spoke to the owner, Kurt Rath, about his desire to purchase a diamond for investment purposes. Rath went to New York and bought such a diamond which he arranged for Abo to examine at the jewelry store on Friday, October 13, 1978, at noon. Abo came to the store at the appointed time and saw the diamond. He said that his investment accountant, Stuart Klein, would also examine the stone and that, if he decided upon its purchase, payment would be made from an estate account.

Shortly after 6 p.m. a man who gave the name, Stuart Klein, entered the jewelry store. He showed

Rath a letter of recommendation from an accounting firm. Klein examined the diamond and in payment gave Rath a certified check for $16,050. The next day Rath went to the Fidelity Trust Company in Stamford, the drawee of the check. There he learned that the estate account on which the check had been drawn was closed. Rath proceeded to file a complaint with the Norwalk police.

Less than a week later, on October 18, 1978, a man using the name, Arthur Abo, entered Charlop's Jewelers, a jewelry store owned by Martin Charlop located on Main Street in Danbury. Abo indicated that he wanted to buy a large diamond both as an investment and as a present for his wife. He chose one of the diamonds presented to him for examination, indicated his intention to purchase it, and asked Charlop if a certified bank check would be acceptable.

Two days later, on October 20, 1978, also a Friday, Abo returned to the store to complete the transaction. In the meantime, however, Charlop had received a flyer from a jewelers' trade association detailing the circumstances of the fraud at the jewelry store in Norwalk, giving the names used, Arthur Abo and Stuart Klein, and providing a description of each. When he observed Abo in the store, Charlop instructed one of his employees to call the police.

Russell Benjamin, a detective with the Danbury police department, was dispatched to the store at 6:45 p.m. He met Charlop who told him that a man, whom he pointed out as having used the name Arthur Abo, had been in the store on a previous day and had arranged to purchase a diamond for a set price. Charlop said that he had afterward received the flyer concerning the Norwalk incident which also involved someone using the name Arthur Abo. He also gave Benjamin the trade association flyer which the officer read in the store.

Benjamin asked the man pointed out by Charlop and who fitted one of the two descriptions contained in the flyer to accompany him to police headquarters. The man, who identified himself as Andrew Posnack, cooperated. On the way to the police station, Posnack expressed some concern about his car which was parked on a side street around the corner and approximately 350 feet from the jewelry store. He pointed out an automobile bearing a New York registration. Benjamin contacted headquarters and requested that an officer be sent to watch the car.

Another detective, Roger Bertalovitz, had arrived at Charlop's Jewelers as Benjamin and Posnack were leaving the store. Bertalovitz conferred briefly with Benjamin and learned about the suspected attempt to defraud the jewelry store. He returned to headquarters where he learned that Posnack was being interviewed by Benjamin, whom he overheard speaking to someone about the Norwalk situation. He also read the flyer concerning the Norwalk incident and familiarized himself with the descriptions it contained.

After remaining at headquarters about ten or fifteen minutes, Bertalovitz received a call from the officer who had been assigned to watch Posnack's car, Philip Colla. Bertalovitz had driven Colla to the location of the car and had told him to secure it. About ten minutes after he arrived, Colla observed the defendant walk down the street, pass the car, turn around and return toward the car where Colla was stationed. He asked the officer for the time. He then withdrew a key from his pocket and attempted to enter the automobile. At this point Colla, having been instructed that nobody was to tamper with the car, told the defendant to stop and also asked whose car it was. The defendant said it belonged to a friend of his who was shopping on Main Street. The defendant then started walking on the side street toward Main Street and turned the corner toward

the jewelry store. Colla called headquarters to report that someone had been at the car. Detective Bertalovitz soon came to the scene and was advised of what Colla had observed. Both officers in the police car followed in the direction in which the defendant had walked. They found him on Main Street a short distance beyond the jewelry store. They requested some identification from the defendant, who responded that he had some in the parked car. He returned in the police car to the parked vehicle and entered it with a key. From a briefcase in the car he produced a New York driver's license bearing his name, Gerald Gasparro.

The defendant was taken to police headquarters. The parked car was also taken there and searched. The defendant moved to suppress the evidence obtained in this search as well as the identification of the defendant by witnesses as a participant in the Norwalk crime which resulted from his arrest by the Danbury police. The court, *Herman, J.*, denied the motion.

"It is well established that probable cause to arrest exists if: '(1) there is probable cause to believe a crime has been committed; and (2) there is probable cause to believe that the person to be arrested committed that crime.' " *State* v. *Daley,* 189 Conn. 717, 720, 458 A.2d 1147 (1983); *State* v. *DeChamplain,* 179 Conn. 522, 529, 427 A.2d 1338 (1980); 1 LaFave, Search and Seizure (1978) § 3.7; Practice Book § 593. "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois* v. *Gates,* U.S. , 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527, reh. denied, U.S. , 104 S. Ct. 33, 77 L. Ed. 2d 1453 (1983). "[W]e deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States,* 338 U.S. 160, 175, 69

S. Ct. 1302, 93 L. Ed. 1879 (1949). The determination of probable cause must be made from the "totality of the circumstances." *Illinois* v. *Gates,* supra, 2328.

We are satisfied from our review that when officer Bertalovitz accosted the defendant on Main Street he had sufficient reliable information to support a reasonable belief that the defendant had participated in the Norwalk fraud as well as the attempted fraud in Danbury. The trade association flyer which he had read contained an account of the circumstances of the use of the bogus certified check in bilking Sheaff's jewelry store in Norwalk of an expensive diamond. There can be no question but that it provided a sufficient basis for believing that Posnack, then using the name Stuart Klein, had committed that crime in association with another person, who used the name Arthur Abo. The flyer contained physical descriptions of both men. Bertalovitz testified that, when he first saw the defendant on Main Street, he "fit that description," presumably the one not suiting Posnack, whom the officer had previously observed. The remaining description in the flyer, given for Arthur Abo, was of "a clean-shaven, white male, about 35 years old, 5'8" tall, stocky build about 184 lbs."

Bertalovitz also was aware that Posnack, using the name Arthur Abo but matching the description in the flyer for Stuart Klein, had just been arrested by a fellow officer for an attempted fraud of a jewelry store similar in many respects to the Norwalk crime five days earlier. It was not illogical to infer from the similarity of the crimes that the technique to be employed involved participation by the person referred to in the flyer as Arthur Abo, but in a different role. In ordering Colla to watch the car identified by Posnack, Bertalovitz had a substantial basis for believing that anyone attempting to use the vehicle had probably been associated with Posnack in the Danbury criminal endeavor. The account

given by officer Colla of the defendant's approach to the parked car, his use of a key to enter it and his departure in the direction of the jewelry store without further inquiry or protest when informed that the police had effectively impounded "his friend's" vehicle strongly corroborated this belief. When Bertalovitz saw the defendant on Main Street and realized that he matched the description for Arthur Abo contained in the flyer, he then had sufficient information to justify a reasonable belief that the defendant was the same person who had participated with Posnack in the Norwalk fraud. Although the defendant stresses that the description was "general" and would have suited many other persons, the fact that the defendant had sought to unlock with his key the car used by "his friend," a known participant in the Norwalk incident who was then engaged in a similar endeavor in Danbury, narrowed significantly the number to whom the description could apply. We are persuaded that there was probable cause to arrest the defendant at the time Bertalovitz observed him on Main Street.

Whether or not the defendant could be said to have standing to object to the search of the car, which apparently belonged to Posnack, by virtue of his possession of a key and his involvement in a joint enterprise, it is clear that the subsequent search of the passenger compartment of the car after it was towed to police headquarters, may be justified as an inventory search, "a well-defined exception to the warrant requirement." *Illinois* v. *Lafayette,* U.S. , 103 S. Ct. 2605, 2608, 77 L. Ed. 2d 65 (1983); *Michigan* v. *Thomas,* 458 U.S. 259, 260, 102 S. Ct. 3079, 73 L. Ed. 2d 750 (1982). In the performance of their "community caretaking functions," the police are frequently obliged to take automobiles into their custody. *South Dakota* v. *Opperman,* 428 U.S. 364, 368, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); *Cady* v. *Dombrowski,* 413 U.S. 433,

441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). "A standardized procedure for making a list or inventory as soon as reasonable after reaching the stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person." *Illinois* v. *Lafayette,* supra, 2609.

The car, which was parked on a public street in the business area of Danbury, could hardly be left there indefinitely. Its apparent owner, Posnack, had indicated his concern about leaving the car on the street. The police officer who performed the search testified that it was routine departmental policy under such circumstances to bring a vehicle left on a city street to a parking lot of the police department and to make a complete inventory of the contents. He said that this practice was followed not only to protect the vehicle and its contents but also to forestall claims against the police for missing items.

Since the inventory search of the car was authorized, the search of the unlocked briefcase found in the passenger compartment, which contained two certified checks like those used in the Norwalk fraud, was also permissible. The police were authorized not only to take the briefcase into their custody as part of the routine inventory procedure, but also to make an examination of its contents. *Illinois* v. *Lafayette,* supra, 2611. We conclude that the evidence obtained in the warrantless search of the car was admissible.

III

The claim of the defendant that the court erred in admitting evidence of the incident at the jewelry store in Danbury at the trial of the Norwalk offense is based on two grounds: (1) that such evidence violated the general prohibition against the use of misconduct of a

defendant not related to the crime charged; and (2) that there was an insufficient showing of his involvement in the Danbury incident.

"Evidence of other misconduct, although not ordinarily admissible to prove the bad character or criminal tendencies of the accused, may be allowed for the purpose of proving many different things, such as intent, identity, malice, motive or a system of criminal activity." *State* v. *Ibraimov,* 187 Conn. 348, 352, 446 A.2d 382 (1982). It is clear that the principal issue in this case was the identity of the person who had participated with Posnack in defrauding the Norwalk jewelry store. "Evidence of other crimes or misconduct . . . is admissible on the issue of identity where the methods used are sufficiently unique to warrant a reasonable inference that the person who performed one misdeed also did the other." Id., 354. Such an inference is certainly justified in respect to the defendant's associate, Posnack, who not only selected the same kind of victim and subject matter for the attempted fraud in Danbury but even gave the name, Arthur Abo, which had been used by the defendant in Norwalk. In addition, at police headquarters a wallet was found where Posnack had been sitting, containing a Connecticut driver's license in the name of Arthur Abo and also a certified check made out to Charlop's Jewelers drawn on the same closed account as the check used in the Norwalk fraud. The use of the identical name as well as similar checks in both incidents sufficiently ties them together to indicate that the same persons participated in both.

Although the evidence of the defendant's involvement with Posnack in the aborted Danbury fraud may not have been sufficient to satisfy the standard of proof beyond a reasonable doubt necessary to sustain a conviction for that crime, the circumstances support a reasonable inference that he was probably abetting Posnack at the time. His strange behavior in approach-

ing the car, his failure to inquire why the car of "his friend" was being impounded, his possession of a key, and his departure toward Charlop's jewelry store indicate his awareness of the endeavor in which Posnack was engaged. Another circumstance indicating the close relationship between Posnack and the defendant is that in Norwalk the role of Stuart Klein had been played by Posnack while the defendant had pretended to be Arthur Abo. It is reasonable to infer that Posnack, who had the Arthur Abo driver's license in his wallet at the time of his arrest and used that name in the Danbury store, had received that document from the defendant, who probably had it in his possession as a means of identification when he acted the part of Arthur Abo in Norwalk. We conclude that there was sufficient evidence of the defendant's involvement with Posnack in Danbury to render the evidence of that affair admissible to establish his identity as a participant in the Norwalk offense.

IV

We are unable to review fully the defendant's claim that improper argument by the prosecuting attorney prejudiced him and necessitated the granting of his motion for a mistrial because the argument in question was not recorded. Neither the state nor the defendant requested that the closing arguments be recorded. We have treated the failure to make such a request as a consent to the omission of the arguments from the record. *State* v. *Killenger,* 193 Conn. 48, 59, A.2d (1984); *State* v. *Vitale,* 190 Conn. 219, 226, 460 A.2d 961 (1983).

The defendant maintains, nevertheless, that the state's attorney told the jury, without support in the evidence, that the defendant had thrown some identification document bearing the name of Stuart Klein into a garbage can after his encounter with officer Colla at

the parked car. The state contends that no such statement of fact was made, but that it argued merely that an inference could be drawn from the absence of any identification on the person of the defendant, when the officers found him on Main Street, that he had discarded any such incriminating evidence. The defendant's counsel conceded that he was not sure he had heard the remark correctly. His recital of the remark was termed inexact by the trial court. The court, nevertheless, characterized the prosecutor's claim as "speculation." The motion for a mistrial was denied, but the court did instruct the jury that "there is absolutely no evidence in this case that at that time and place the defendant had any identification indicating that he was Stewart [sic] Klein." The court charged further, "[t]he comment by the prosecutor, I would have to place in the realm of sheer speculation and I admonish you to treat it as such."

"We have frequently refused to consider claims of improper argument where the remarks of counsel have not been transcribed and could not be reconstructed." *State* v. *Vitale,* supra, 226; *State* v. *Sawicki,* 173 Conn. 389, 396, 377 A.2d 1103 (1977). To the extent that the court's instructions constitute a reconstruction of the objectionable argument, we agree with the trial court that it was not so prejudicial that a mistrial was necessary. The curative instruction given to the jury was sufficient to remove any prejudice arising from the prosecutor's remark. *State* v. *Kinsey,* 173 Conn. 344, 349, 377 A.2d 1095 (1977).

V

The final claim of the defendant is that the court failed to grant four of his requests to charge three of which relate to the liability of an accomplice, the fourth pertaining to the use of the evidence concerning the Danbury incident.

The defendant requested a charge that mere presence at a place where a crime is being committed, without more, does not make him an accomplice. In another request he sought, in the context of the defendant's apprehension near the jewelry store in Danbury, an instruction that his presence alone would merely create suspicion and would not by itself permit an inference that he knew a crime had been committed. A third request upon the subject of accomplice liability referred to the Norwalk fraud and invoked the principle that the defendant could not be held criminally responsible for the deeds of another person unless he contemplated or assented to the general criminal purpose and the crime was committed with his knowledge.

The court in charging the jury on the crime of larceny by false pretenses stated repeatedly that the statute required the defendant to have an intent to defraud and that the state must prove this element beyond a reasonable doubt. It charged also upon the accessory statute, General Statutes § 53a-8,[4] reading the text and explaining its various terms. With respect to the mental element necessary for liability as an accomplice, the jury were told that "[t]o find a person guilty . . . you must find that he has a criminality of intent and unlawful purpose in common with the person or persons who actually committed the crime." The court continued: "If you find that another person committed the larceny in question, then the next thing you must decide is whether the defendant shared the intent of the person who committed the crime." We are satisfied from our review that the charge adequately instructed the jury upon the necessary mental element for accomplice lia-

[4] "[General Statutes] Sec. 53a-8. CRIMINAL LIABILITY FOR ACTS OF ANOTHER. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

bility, which is the central thrust of the defendant's requests. The failure to grant the request that "mere presence" at the scene of a crime, without more, is insufficient was not such a deficiency as to render the instructions inadequate as a guide to the jury in reaching their verdict. *State* v. *Falcone,* 191 Conn. 12, 26–27, 463 A.2d 558 (1983); *State* v. *Corchado,* 188 Conn. 653, 659–60, 453 A.2d 427 (1982). As applied to the Norwalk crime on trial, the requested instruction was inappropriate because the evidence established that the defendant's involvement in the role of Arthur Abo went far beyond "mere presence."

With respect to the attempted fraud in Danbury the "mere presence" instruction may have been more consistent with the evidence, but the defendant was not charged with that crime. The purpose of that evidence was to identify the defendant as the person who had participated as Arthur Abo in the Norwalk fraud by connecting him with Posnack, who assumed that role in Danbury. The references in the defendant's request to finding him "guilty" because of suspicion arising from his presence near Charlop's jewelry store might well have confused the jury by suggesting his involvement in Danbury had to be proved beyond a reasonable doubt before such evidence could be utilized.

The remaining request of the defendant was for an instruction that the jury should disregard the Danbury incident if they did not believe the defendant had "committed the Danbury offense." The quoted language again tends to imply erroneously that the criminal standard of proof is to be used in making the determination and, in conjunction with the request discussed previously, might well have confused the jury. With reference to the Danbury incident, the court charged adequately on the limited purpose for which that event should be considered and left to the jury the weight to

be given the evidence "that the defendant was possibly connected, in some degree, to an attempted larceny in Danbury."[5]

There is no error.

In this opinion the other judges concurred.

---

[5] This portion of the charge was as follows:

"There has been evidence presented to you that the defendant was possibly connected, in some degree, to an attempted larceny in Danbury. This evidence may not be considered by you to prove that the defendant is guilty of the crime charged against him, nor may it be considered by you to show that the defendant is a man of bad character.

"Such evidence is admissible for a variety of other purposes; however, such as showing such things as intent, an element in the crime, identity, malice, motive or a system of criminal activity.

"Having heard such evidence its applicability to any of these exceptions is up to you."

Although some of the purposes specified for which the Danbury evidence might have been used under this instruction, such as "malice," were irrelevant to the issues in the case, no exception to the charge was taken by the defendant in that respect.

APPENDIX B

MEMORANDUM OF DECISION

The motion to suppress before the court arises from an information charging defendant with the crime of larceny in the first degree. Defendant allegedly obtained property by false pretense from Shaeff's Jewelers in Norwalk, Connecticut, on October 13, 1978. The defendant was arrested without a warrant in Danbury, Connecticut, by Danbury police officers seven days after the alleged larceny took place in Norwalk.

The alleged crime and subsequent arrest occurred in the following manner: On October 11, 1978, an individual identifying himself as Arthur Abo arranged to purchase a diamond for $16,050 from Shaeff's Jewelers. On October 13, 1978, a second individual, identifying himself as Stuart Klein, picked up the diamond, making payment with a fraudulent certified check drawn on a closed account. The crime was described in a flyer entitled "Hot Line Memo" issued by the Connecticut Retail Jewelers Association, dated October 19, 1978. The flyer was not a police bulletin but contained information, some of which was obtained from the Norwalk police department. The flyer described the two males involved as white, clean shaven, and approximately thirty-five years old. "Arthur Abo" was further described as 5'8" tall with a stocky build and approximately 185 pounds. "Stuart Klein" was described as 5' 6" tall, medium build, approximately 150 pounds and wearing brownish rimmed glasses.

On October 20, 1978, at approximately 6:45 p.m., Officer Russell Benjamin of the Danbury Police department responded to a radio call reporting an attempted larceny at Charlop's Jewelers in Danbury. Officer Benjamin proceeded to the store and spoke with Martin

Charlop. Mr. Charlop pointed to a man in the store and explained that the man had previously visited the store, arranged to purchase a diamond, and had given his name as Arthur Abo. Since "Abo's" last visit, Mr. Charlop had recieved the Hot Line Memo and recognized that the man in the store fit the description and used the name of the person described in the Memo as being involved with the theft in Norwalk. Officer Benjamin took the man into custody. He identified himself as Andrew Posnack.

On the way to the Danbury police station, Posnack expressed concern for his automobile. Officer Benjamin made a radio call to police headquarters and Special Officer Philip Colla was directed to secure the automobile pointed out by Posnack as belonging to him. As of this time the defendant had neither made an appearance at Charlop's Jewelery Store, nor was there any indication that any second individual was involved with Posnack's activities at Charlop's.

Shortly after being assigned to secure Posnack's automobile, Officer Colla observed the defendant walk by the automobile, return, and attempt to enter it with a key. Officer Colla informed defendant that no one was to enter the automobile and asked defendant who it belonged to. The defendant responded that it belonged to a friend. Defendant then left the scene and walked up the street.

Officer Colla informed police headquarters of the occurance and was joined by Detective Roger Bertalovitz, who had familiarized himself with the Hot Line Memo. The two policement located the defendant, stopped him and asked him for identification. Defendant stated he had identification in the car. He was brought back to the car where, from the back seat area, he produced a driver's license

bearing his name. Defendant was then taken into custody.

The state concedes that at the time of his arrest, probable cause did not exist to take defendant into custody for the activity that occurred earlier in the evening in the Danbury jewelery store. The state does, however, assert that the Danbury police did have probable cause to arrest defendant for the Norwalk theft.

Defendant argues that under the applicable Connecticut statute, his arrest by the Danbury police for a crime that occurred in Norwalk one week earlier was illegal.

Connecticut General Statutes §54-1f, as it read at the time this matter arose, stated:

> "Arrest without warrant, Pursuit outside precincts, Sheriffs, deputy sheriffs, chief inspectors and inspectors in the division of criminal justice, constables, borough bailiffs, police officers, special protectors of fish and game and railroad and steamboat policemen, in their respective precincts, shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when such person is taken or apprehended in the act or on the speedy information of others, and members of the state police department or any local police department or any chief inspector or inspector in the division of criminal justice shall arrest without previous complaint and warrant, any person who such officer has reasonable grounds to believe has committed or is committing a felony. Members of any local police department, when in the immediate pursuit of one who may be arrested under the provisions of this section, are authorized to pursue such offender outside of their respective

> jurisdiction into any part of the state in order to effect the arrest. Such person may then be returned in the custody of such officer to the precinct in which the offense was committed. Any person so arrested shall be presented with reasonable promptness before the proper authority.

Defendant claims his arrest was illegal where "the authority of the Danbury police to arrest without a warrant is limited to 'their respective precincts' for an offense 'in their jurisdiction' except when in immediate pursuit.'" Defendant's brief at 8. Defendant is obviously referring to that portion of the statute which reads: "police officers...in their respective precincts...shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when such person is taken or apprehended in the act or on the speedy information of others..." The statute, however, goes on to state, "members...of any local police department...shall arrest, without previous complaint and warrant, any person who such officer has reasonable grounds to believe has committed or is committing a felony."

The Connecticut Supreme Court has had opportunity to discuss the validity of arrests made pursuant to the statute in question. In this regard, the Court in State v. Hoffler, 174 Conn. 452, 458 (1978), recognizing the standards set forth in Terry v. Ohio, 392 U.S. 1, and reaffirmed in Adams v. Williams, 407 U.S. 143 stated:

> "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Effective crime prevention and detection underlie the

> recognition that a police officer may in appropriate circumstances and in an appropriate manner approach an individual for purposes of investigating possibly criminal behavior even though there is no probable cuase to make an arrest.... In justifying the particular intrusion the police officer must be able to point to specific and articuable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." [citations omitted].

See State v. Penland, 174 Conn. 153, 155 (1978); State v. Rice, 172 Conn. 94, 97 (1976).

In the present case, the crime for which the defendant was stopped was a felony. At the time he was stopped and taken into custody, the Danbury police officers had reasonable grounds to stop the defendant. They had just arrested an individual for a jewelry store larceny. Defendant had attempted to enter the automobile of the person just arrested with a key. The police officers had been made aware of the jewelry store theft in Norwalk a week earlier. Both the individual just arrested and the defendant fit the description of the individuals suspected in the Norwalk crime. The facts and circumstances can also be concluded to have provided probable cause for defendant's arrest. The standard for probable cause was stated in State v. Penland, supra at 155.

> "Probable cause means more than mere suspicion. There must be facts and circumstances within the officer's knowledge, and of which he has trustworthy information, sufficient to justify the belief of a reasonable person that an offense has been or is

being committed. Beck v. Ohio, 379 U.S. 89, 91; Brinegar v. United States, 338 U.S. 160, 175.

Here, having stopped the defendant, the police officers had a greater opportunity to observe that defendant fit the description of an individual involved with the Norwalk theft. This observation, coupled with defendant's attempt to enter Posnack's automobile, provided probable cause to arrest defendant.

The motion to suppress is denied.

Hermaf
Judge

Filed February 23, 1982

APPENDIX C

No. 11520

STATE OF CONNECTICUT
v.
GERALD ANTHONY GASPARRO

SUPREME COURT
STATE OF CONNECTICUT
OCTOBER 10, 1984

ORDER

THE MOTION OF THE DEFENDANT, FILED AUGUST 9, 1984, FOR REARGUMENT

HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

FRANCIS J. DRUMM, JR.
CHIEF CLERK

By .....
Assistant Clerk-Appellate

Notice Sent:

Donald Browne, S.A.
Jonathan C. Benedict, A.S.A.
Robert Rasamny
Lawrence A. Porcari
Donald H. Dowling, Reporter
of Jucicial Decisions
Chief Clerk, Fairfield J.D.
(Trial Court # 26,244)
10-10-84

APPENDIX D

No. 11520

STATE OF CONNECTICUT	SUPREME COURT
v.	STATE OF CONNECTICUT
GERALD ANTHONY GASPARRO	AUGUST 9, 1984

MOTION FOR REARGUMENT

Gerald Anthony Gasparro, pursuant to Section 3111A of the Connecticut Practice Book moves for reargument for the following reasons:

This Court's decision with a determination of no error was announced July 31, 1984. Two of the five issues determined by the Court involved claimed violations of the defendant's constitutional rights. The Court erroneously made determinations of fact, refused to recognized the State's in Court concession that the defendant's arrest for the Danbury crime was illegal, failed to remand the case for further hearings upon issues of fact regarding the violation of his right to a speedy trial and the search of an automobile and denied the defendant due process of law.

Defendant,

By .....
ROBERT RASAMNY

and

.....
LAWRENCE A. PORCARI

No. 11520

STATE OF CONNECTICUT	SUPREME COURT
v.	STATE OF CONNECTICUT
GERALD ANTHONY GASPARRO	AUGUST 9, 1984

C.P.B. SEC. 3098 STATEMENT IN SUPPORT OF C.P.B. 3111A MOTION FOR REARGUMENT

1. *History.* Gasparro was arrested by the Norwalk police pursuant to a warrant issued on October 21, 1978, and based on evidence derived from his prior illegal investigative arrest by Danbury police for a crime in Danbury. He was arraigned on October 24, 1978, on an information charging him with the crimes of larceny in the first degree and conspiracy, for the theft of a diamond from a Norwalk jewelry store on October 13, 1978.

On November 15, 1978, a Superior Court information was filed for the same offense charging defendant with larceny in the first degree by obtaining property by false pretense. On December 5, 1978, defendant moved to suppress identification and other evidence derived from his unlawful arrest by the Danbury police. The case was scheduled for trial on May 8, 1980. On that date an amended information was filed and served and the case was then continued to May 28, 1980, for trial. On May 28, 1980 the case was adjourned without date because the state was not ready for trial. On February 23, 1982, the suppression court decided that the Danbury police had probable cause to arrest Gasparro for the Norwalk theft and denied defendant's motion. Defendant's motions to dismiss upon the grounds that he was denied a speedy trial and the law defining the offense is unconstitutional were denied on or about May 10, 1982.

Defendant was tried by jury and found guilty on May 19, 1982. He was sentence to a term of imprisonment of 8 to 16 years. His appeal was filed on July 6, 1982. Upon review of defendant's sentence, his sentence was modified and the matter remanded to the sentencing court for resentencing of defendant to a term of 5 to 10 years. On March 18, 1983, defendant was resentenced to a term of imprisonment of 5 to 10 years. The

appeal was argued May 3, 1984. The Court's decision was announced July 31, 1984.

2. *Facts.* The Court's decision was that there was no error. Two of the five issues determined by the Court involved claimed violations of the defendant's constitutional rights. The Court erroneously made determinations of fact, refused to recognized the State's in Court concession that the defendant's arrest for the Danbury crime was illegal, failed to remand the case for further hearings upon issues of fact regarding the violation of his right to a speedy trial and the search of an automobile and denied the defendant due process of law.

3. *Legal grounds.* It is believed that the reasons stated above constitute sufficient grounds for the Court to grant the appellant's motion for reargument.

Defendant,

By .....
ROBERT RASAMNY

and

.....
LAWRENCE A. PORCARI

The foregoing Motion, having been heard by the Court, it is hereby ORDERED granted/denied.

BY THE COURT

.....

Clerk

I hereby certify that a copy of the above was mailed on August 9, 1984, to all counsel of record.

.....

LAWRENCE A. PORCARI

APPENDIX E

MOTION TO SUPPRESS

The defendant moves this Court, pursuant to C.G.S. Section 54-33f and Section 2231 et seq of The Rules of Procedure in Criminal Cases, to suppress for use as evidence the following:

1. The identification of the defendant by Kurt Rath, Richard Schoen and Harold Sheaff.

2. All tangible objects seized as a result of the search of the defendant and a Ford Sedan bearing New York registration number 892 YBG.

3. Any written or oral statements of the defendant resulting from police interrogation or custody.

4. Any other evidence derived from or through defendant's arrest in Danbury, Connecticut on October 20, 1978.

Defendant states as grounds for this motion:

1. The identification of the defendant is illegal because:

a. it results from the illegal arrest of the defendant;

b. the photographic array used for identification purposes was suggestive or otherwise improper;

c. defendant was not properly advised of his constitutional rights;

2. The search of defendant's person and the automobile was illegal and unreasonable because:

a. the search was not conducted pursuant to a search warrant;

b. the search was not incidental to defendant's lawful arrest;

c. the search was conducted without consent.

3. Defendant's statements were illegally obtained because:

a. they resulted from his illegal arrest;

b. defendant was not properly advised of his constitutional rights.

4. Evidence obtained through or from defendant's arrest in Danbury is tainted by his illegal arrest.

A motion to suppress or a similar motion has not been previously filed or ruled upon.

Wherefore, the defendant requests that this motion be granted.

GERALD GASPARRO

BY: ROBERT RASAMNY and

LAWRENCE A. PORCARI
His Attorneys

ORDER

The above motion having been heard same is granted/denied.

BY THE COURT

_____

APPENDIX F

MOTION TO DISMISS

The defendant moves this Court, pursuant to Sec. 815 of The Rules of Procedure in Criminal Cases, to dismiss the amended information because he has been denied a speedy trial:

1. The original information charging the defendant with larceny in the first degree by obtaining property by false pretense was filed on or about November 15, 1978.

2. On May 8, 1980, a date on which this case was scheduled for trial, the State's Attorney filed and served an amended information charging the same offense, but changing the description of the property allegedly taken. Leave to serve the amended information was granted over defendant's objection and without prejudice to defendant's right to move to dismiss because of the State's failure to go forward with the trial of the case. The case was continued to May 28, 1980 for trial.

3. On May 28, 1980, the defendant was ready for trial but the State's Attorney was not and this case was adjourned without date and without defendant's consent.

Defendant states as grounds for this motion:

1. The State has failed to proceed without undue delay;

2. Except for a period not exceeding six months all of the delay in bringing the case to trail is attributable to the State's Attorney;

3. By reason of the delay of more than thirty-six months in bringing this case to trial the defendant has been denied his right

to a speedy trial under the Constitution of The United States and under the laws of the State of Connecticut.

The same or a similar motion has not been previously filed or ruled upon.

Wherefore, the defendant requests that this motion be granted.

GERALD ANTHONY GASPARRO

By: Robert Rasamny &
Lawrence A. Porcari,
His Attorneys

Filed May 10, 1982

ORDER

The above motion having been heard same is denied.

BY THE COURT

McKeever, J.

5/11/82

APPENDIX G

AMENDED INFORMATION

FRANK S. MACO, Asst. State's Attorney for the JUDICIAL DISTRICT OF FAIRFIELD accuses GERALD ANTHONY GASPARRO of LARCENY IN THE FIRST DEGREE BY OBTAINING PROPERTY BY FALSE PRETENSE and charges that at the City of NORWALK, Fairfield County, on the 13th day of OCTOBER 1978, between 12:00 P.M. and 7:00 P.M. at Sheaff's Jewelers, Wall Street, Norwalk, the said GERALD ANTHONY GASPARRO pursuant to one scheme or course of conduct, did commit larceny of the personal property of KURT RATH, to wit: a diamond, valued in excess of Two Thousand Dollars ($2,000.), by obtaining property by false pretense, in violation of Section 53a-119(2), Section 53a-122(a)(2) and Section 53a-121(b) of the Connecticut General Statutes.

Dated at Bridgeport, Connecticut this 8th day of May, 1980.

FRANK S. MACO
Assistant State's
Attorney for the
Judicial District of
Fairfield Part A

Filed May 8, 1980

APPENDIX H

Testimony of Danbury Police Officer Philip Corla, pages 92-93

question in your mind, sir, that Pikalowitz [sic] at this point was on duty as a police officer?

A None.

Q And that this Detective Pikalowitz [sic] directed Gasparro to get in the car; isn't that true?

A Yes.

Q And I'm talking about this white male who you say is now Gasparro; right?

A Uh-huh.

Q Now, this white male, he complied with that direction; isn't that true?

A Yes, it is.

Q There's no struggling. He didn't try to run; did he?

A No.

Q And when he got in the car, either you or Pikalowitz [sic] drove away in that police vehicle with this unknown white male in it; isn't that true?

A Yes, sir.

Q Isn't it also true, sir, that you were taking him later on back to headquarters for additional investigation?

A Yeah.

Q Isn't it true, sir, that it was also your understanding that some of that additional investigation was going to include questioning of that unknown white male?

A I have no idea.

Q Did you read your supplement as part of the incident report before coming here today, sir?

A Uh-huh.

THE COURT: Officer, answer yes or no. She has to record your answer.

THE WITNESS: I'm sorry. Yes.

Q Do you recall saying, sir, that one of the purposes, at least, a purpose for taking Gasparro to headquarters was for further questioning?

A Yes, but I wasn't involved in it.

Q I didn't say you were involved in the questioning, sir.

What I want to know is if you were aware of the purpose?

A Oh, okay. I will have to say yes to that then.

Q But still, at that point, while you were conveying Gasparro to police headquarters for further questioning and for further investigation, even at that time, you had no warrant for his arrest?

A No.

Q Isn't that correct?

A That's right.

Q And at that point, to the best of your knowledge, there was no search warrant either; was there?

A No.

Q Now, you actually saw Pikalowitz [sic] and Gasparro at this green Ford together?

A I did.

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Testimony of Danbury Detective Roger Bertalovitz, pages 281-282

Sharlop's attempted larceny; isn't that true?

A My purpose was to connect him with the larceny at Sharlop's.

Q The attempted larceny at Sharlop's?

A No, that was not my sole purpose.

Q Isn't it true, sir, that one of your purposes was to connect him — this "John Doe" white male with the attempted larceny that you were made aware of at Sharlop's?

A Determine if — yes.

Q Isn't it true, sir, that you did not reveal that purpose to this unknown white male?

A At what point, sir?

Q While you were at the car — at the Ford.

A No, I did not.

Q Isn't it true, you didn't reveal that purpose when you confronted him on the sidewalk?

A I don't recall that, sir.

Q Well, is there anything that would refresh your recollection as to whether or not, at any point, you revealed that purpose to this unknown white male?

A Not that I would be aware of. No.

Q When you got this "John Doe" to police headquarters, you still wanted to question him; isn't that a fair statement?

A Correct.

Q And you proceeded to question him either alone or in conjunction with one or more other Danbury police officers?

A That's correct.

Q And one of your purposes in questioning him, was to connect him with the attempted larceny that had been perpetrated at Sharlop's?

A Again, determine if he was involved.

Q Yes. That was one of your purposes?

A To determine if he was involved.

Q Yes.

A Yes.

Q When you say, "determine", you mean you had in mind an investigatory purpose, in police language, isn't that right?

A Yes.

Q Now, isn't it true, sir, this was an investigatory stop?

A Correct.

Q All right. And it was an investigatory detention; isn't that true?

A Correct.

MR. PORCARI: No further questions.

MR. BENEDICT: I just have a couple of questions, Detective Bertalovitz.

REDIRECT EXAMINATION BY MR. BENEDICT:

Q When you headed out to assist Officer Colla in locating or apprehending a person, did you have any idea what that person's name was?

A No, I did not.

Q Now, do you recall – I think you testified in cross-examination that you got to Sharlop's Jewelry and

end of page 282

Testimony of Danbury Detective Roger Bertalovitz, page 272

A That is not true.

Q Isn't it true, when he was inside headquarters being questioned, he was not free to go?

A Certainly not true.

Q Let me see if I understand, sir. It's your statement, sir, that during this entire period if Gasparro wanted to leave, all he had to do was walk out?

A That's correct.

Q You arrested him; didn't you?

A No, I did not.

Q Didn't the Danbury police arrest him?

A Yes, he was arrested.

Q Just so I understand it. He was arrested while he was in headquarters. He wasn't someplace else?

A No. That's correct.

Q And at the very same place where you took him; isn't that right?

A That's correct.

Q Okay. So you picked him up off the street, brought him to another location and then from that other location where some luggage was taken out of the car and some other information was obtained, from there you went to Danbury Police Headquarters and then he was questioned in Danbury Police Headquarters and then he was arrested. Is that what happened?

A Then he was arrested, yes.

Q Of course, the first thing you said to him when he

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(3)

Office-Supreme Court, U.S.
FILED
JUL 22 1985
ALEXANDER L. STEVAS,
CLERK

84-2029

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1984

GERALD ANTHONY GASPARRO,
Petitioner,

V.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Donald A. Browne
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July 19, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Did the State circumvent and expand the law of police stops set out in *Terry v. Ohio*, 392 U.S. 1 (1968).

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STATEMENT OF THE CASE

On May 19, 1982 in the Superior Court for the Judicial District of Fairfield, Connecticut, the petitioner was convicted of Larceny in the First Degree by Obtaining Property by False Pretense, in violation of Connecticut General Statutes 53a-119(2), 53a-121(b) and 53a-122(a)(2).

The conviction evolved from the theft of a diamond on October 13, 1978 from Shaeff's Jewelers, a jewelry store in Norwalk, Connecticut. His arrest and prosecution stem from the following incident in the City of Danbury, Connecticut on October 20, 1978: At the hearing of the motion to suppress Detective Russell Benjamin of the Danbury Police Department testified that, on October 20, 1978, while on routine motor patrol duty he was directed at about six forty-five p.m. to proceed to Charlop's Jewelers to investigate an attempted larceny (SH 4). Upon Benjamin's arrival he spoke to Martin Charlop who pointed to a man and told the officer that that man had given the name of Arthur Abo, and had been in the store on a previous day and made arrangements to buy a diamond for a set price (SH 5). Payment was to be by check (SH 40). Charlop further stated that he had received flyers concerning a person, fitting the man's features and using the name of Arthur Abo, having passed fraudulent checks in Norwalk and attempting to make similar transactions in other jewelry stores throughout the state (SH 5). Charlop then turned a flyer over to Benjamin who read it briefly while in the store and in further detail after his arrival at police headquarters. (State's Exhibit A SH 6, 7). This document, entitled Hot Line Memo described an October 13th diamond theft at Shaeff's Jewelers, Norwalk, as follows: Two men had perpetrated a fraud on a Norwalk Jewelry, where one, purporting to be named Arthur Abo was discovered as being about thirty-five years old, five feet eight inches tall, with stocky build and weighing about one hundred and eighty-five pounds. This person had discussed the purchase of a diamond. Two days later a second party appeared. Giving the name of Stuart Klein, he was described as also being about thirty-five years old. five feet six inches tall, with medium build, weighing about one hundred and fifty pounds and wearing

brownish-rimmed glasses. This person, the Hot Line Memo recited, purchased the diamond with an allegedly certified check in the amount of sixteen thousand dollars. Investigation revealed a fraudulent certification on a closed account.

As a result of the foregoing information with which he'd been presented, Benjamin asked the man that Charlop had pointed out to accompany him to police headquarters. The man, who identified himself as Andrew Posnack, cooperated (SH 9). While enroute (SH 12) Posnack voiced concern for his automobile, a green 1970 Ford with a New York marker plate which was parked (SH 14) around the corner from Charlop's (SH 3, 6). Because of Posnack's concern for his car and because Benjamin was aware that the flyer indicated that two persons were involved in the fraud case (SH 75), Benjamin radioed headquarters and requested that an officer be assigned to watch the car (SH 14). Once at headquarters, the Norwalk police department was contacted regarding the incident (SH 42). Benjamin further testified on direct examination that Posnack and the defendant, who was brought into headquarters later that evening, resembled the descriptions detailed in State's Exhibit A (SH 17-21).

Philip Colla testified that he was on duty as a special police officer on October 20, 1978 (SH 76), when at around 7:00 p.m. he was directed to watch and secure a green Ford with New York Plates parked on Keeler Street (SH 77-78). After Colla had beenon site for about ten minutes he observed the defendant (SH 80), being a white male five feet six to five feet eight inches in height, aged, thirty to thirty-five years, clean shaven with brown hair, walk past the car turn and come back toward it and ask the officer for the time. This person then attempted to enter the car with a key (SH 79). Colla thereupon told the defendant to stop, indicating that he'd been assigned to secure the car, and asked whose car it was. The defendant responded that the car belonged to a friend who was shopping up on Main Street and then left, walking up Keeler Street (SH 81). Colla then radioed for assistance, which arrived shortly in the person of Detective Bertalovics (SH 81-82). The two then pursued the defendant, stopping him on Main Street where Bertalovics

requested some identification. When the defendant indicated that he had none on his person, but rather it was back in the car on Keeler Street, Bertalovics directed him to get into the police vehicle (SH 82). Once at the car, the defendant entered it and produced his driver's license from a brown flat type briefcase; the petition was then taken to the police station.

Detective Roger Bertalovics testified that while on duty on the night of October 20, 1978 he was requested to go to Charlop's Jewelry where he encountered Officer Benjamin walking out of the store with Posnack (SH 244-245). At that point the two officers conferred briefly and then Bertalovics returned to headquarters where he remained for ten to fifteen minutes until receiving a request for assistance from Officer Colla (SH 246). During that interval Bertalovics familiarized himself with a couple of bulletins including the Hot Line Memo (State's Exhibit A) which detailed the Norwalk crime (SH 283-286). Bertalovics proceeded to Keeler Street where he met with Colla who advised him of the defendant's attempt to enter the car and subsequent departure from the scene (SH 247). Upon locating the defendant on Main Street, Bertalovics, noted that he fit the description set out in the Hot Line Memo. When the defendant could not produce identification he was taken back to Posnack's car (SH 247, 264) which he entered with a key (SH 248) and from which he produced his New York State driver's license (SH 249). At that point, the defendant was taken to police headquarters (SH 253).

ARGUMENT

Notwithstanding petitioner's contention that the circumstances surrounding his seizure on Main Street, Danbury, should be viewed as an unjustified extension of an investigative detention *Terry v. Ohio*, 392 U.S. 1 (1968) the Connecticut Supreme Court took a different view; that when Petitioner was stopped he was in effect placed under arrest and that arrest was based upon probable cause.

In so finding the Connecticut Supreme Court relied on: (1) the close proximity in time between the underlying offense and that in

Danbury; (2) various similarities between the two offenses including type of offense, and the common distinctive alias that was employed in both crimes and; (3) the logical connection of the petitioner to both offenses including his matching the description of one of the participants in the Norwalk crime and his possession of and attempt to use the key to the car that belonged to his acknowledged friend, Andrew Posnack, who had just been taken into custody for the attempted theft at the Danbury jewelry store.

Probable cause exists "where the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has occured." *Carroll v. United States*, 267 U.S. 132, 162 (1924). "In dealing with probable cause... as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160. 175 (1948). The determination is to be made from the totality of the circumstances, *Illinois v. Gates*, 462 U.S. 213, 230 (1983), probable cause being "... a fluid concept - turning on the assessment of probabilities on particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules" Id at 232.

In the instant case, the Connecticut Supreme Court bypassed the investigative detention on articulable suspicion approach, *Terry v. Ohio, supra*, finding instead that petitioner was actually arrested when stopped on Main Street. That arrest, however was appropriately tested by the above cited rules respecting probable cause and was, given the totality of circumstances pertaining at the time of petitioner's arrest, correctly found to be a lawful arrest under the Fourth Amendment.

CONCLUSION

The State of Connecticut respectfully requests that the Connecticut Supreme Court correctly applied the law and prays that the petition to issue a writ of certiorari be denied.

Respectfully submitted

By: /s/ DONALD A. BROWNE

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July 19, 1985